more truth than fiction in such a separation. As pointed out by Mr. Justice Pitney,[4] unless there is liquidation or a declaration of cash dividends by the corporation, through its officers, a stockholder may not withdraw any part of either capital or profits from the enterprise; his interest not pertaining to any part, divisible or indivisible, but to the entire assets, business, and affairs of the company.

The question was presented very clearly to the Supreme Court,[5] and it was there decided, four judges dissenting, that stock dividends are not income to the individual. This decision has for its basis several decided cases.[6] Also, the decision was reached only after a careful survey and discussion of the economic principles involved. The court, speaking through Mr. Justice Pitney, declared that stock dividends are not an increase of property, but are simply a book-keeping device for adjusting the books of the corporation so as to transfer the "surplus" account to the "capital stock" account, thus permanently tying the profits up in the business.[7] There is *in fact* no income acquired by the receipt of a stock dividend.[8] But the power to tax "income" is derived from the Constitution, and no Constitutional Amendment, nor any Act of Congress, nor any decision of the Supreme Court can make stock dividends income if they are not such *in fact*,[9] nor prevent them from being income if they are in fact income. Therefore, it would seem that the Supreme Court has decided the question in accord with the soundest principles of economics as well as upon the precedent of previous cases.

E. M. P.

THE BEARING OF THE SIXTEENTH AMENDMENT ON THE POWER OF CONGRESS TO TAX ANY INCOME REGARDLESS OF ITS SOURCE.—The Sixteenth Amendment, passed as a result of the decision in

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[4] Eisner *v.* Macomber, 40 Sup. Ct. 189, 193.

[5] Eisner *v.* Macomber, *supra.*

[6] Spooner *v.* Phillips, 24 Conn. 524; Gibbons *v.* Mahon, 136 U. S. 549; Towne *v.* Eisner, 245 U. S. 418.

[7] Eisner *v.* Macomber, 40 Sup. Ct. 189, 194.

[8] Eisner *v.* Macomber, *supra.* "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. * * * The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones." Gibbons *v.* Mahon, 136 U. S. 549, 559, 560.

For example: A shareholder owns 10 shares of stock of the par value of $100 each, and proportional to the shares there is a surplus of $500. Then he has 10 shares of the total worth of $1500. Suppose the corporation to declare a stock dividend of 50%. Then the shareholders would own 15 shares of stock worth $100 each, or a total still of $1500, no increase or income having resulted.

[9] Towne *v.* Eisner, *supra.*

Pollock v. *Farmers' Loan & Trust Co.*,[1] was so sweeping in its terms and all-inclusive in the construction that might by possibility be given it, that its ratification gave rise to grave apprehension—the fear that it would undermine some of the vital safeguards placed about our system of government by constitutional provisions and judicial decisions. The constitutional history of the United States, in the various stages of its development, reveals the jealousy with which these checks and balances were guarded. Yet the Sixteenth Amendment seemed to strike at their very roots and threaten their existence.

The adoption of the Constitution converted a group of States, flaccidly held together by a defective confederation, into an effective federal government. In surrendering essential elements of their sovereignty, the States created a central government of delegated and enumerated powers,[2] with the result that two governing powers arose, each supreme within its own province.[3] It gave rise to a complex system of government; a government of State rule and National rule, bearing a peculiar relation to each other. It is a relation, neither of total dependence nor of total independence, but partaking rather of the nature of inter-dependence.[4]

In this system of government, the State and the Nation are equally necessary, equally indispensable in giving expression to the provisions of the Constitution.[5] Both, therefore, are equally indestructible. To exist, both exercise a power of taxation that is complete and absolute, subject only to such limitations as are prescribed in the Constitution. It is the creative power of government, its very life blood. And yet, this very power to tax, this creative force, may be converted into a force of destruction. It follows then, that the concurrent power of the State and National governments to tax places each in a position so to wield that power as to render it repugnant to the other, for each can render impotent those that come under its authority.

Realizing the situation, the framers of the Constitution inserted certain restrictions and limitations upon this supreme prerogative of the State and of the Nation. Yet these restrictions and limitations proved inadequate to avert a possible clash between the right of one to tax and the right of the other to exist and function normally. A further curtailing of this power was obviously necessary. We find, therefore, in the very infancy of

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[1] 157 U. S. 429; id., 158 U. S. 601.

[2] HALL, CONSTITUTIONAL LAW, § 27.

[3] "There are in every State two governments, each having powers peculiar to itself, and neither of them entitled to exercise any authority that has been exclusively delegated to the other." 1 HARE, AMERICAN CONSTITUTIONAL LAW, p. 36.

[4] 1 BRYCE, THE AMERICAN COMMONWEALTH, pp. 425, 426.

[5] "Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States." Collector *v.* Day, 11 Wall. 113, 125.

the constitutional history of this country, the constitutional restrictions supplemented by judicial interpretations and decisions. It was Chief Justice Marshall, who, it is said, vitalized the Constitution, giving it a new force and the Union a firmer foundation, who laid the basis for these supplementary curtailments by his masterful opinion in *M'Culloch* v. *Maryland*.[6]

Based upon the nature of our system of government and the functions of its component parts, together with the nature of a power to tax and the extreme to which it may be carried, the principle of implied restrictions was enunciated.[7] The principle is reciprocal. Just as it is contradictory to create a government of supreme powers and then permit its governmental functions to be hampered and perhaps destroyed by its creators; equally contradictory it is to permit the created government to tax into impotence those units of the federation, so essential in our form of political life. Just as it is necessary to circumscribe the taxing power of the States so as to permit the Federal government an untrammeled exercise of its activities, equally is it necessary, and for like reasons, that the taxing power of the Federal government be restricted.[8]

Thus, the checks and balances, in the form of constitutional restrictions on the power to tax, were buttressed by judicial decisions and interpretations. There arose these implied restrictions, gigantic barriers, that prevented the stifling of the free exercise of governmental operations of the State and of the Nation. The theory underlying these limitations was not based upon the extent to which, nor the intent with which, the taxing power was exerted, but upon the inherent right to tax. It has been aptly put:[9] "If they (government agencies) may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted."

It was these checks and balances, the fences erected as a safeguard about our constitutional liberties, that gave strength and endurance to our government; and it was these checks and bal-

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[6] 4 Wheat. 316.

[7] "There are, we admit, certain subjects of taxation which are withdrawn from the power of the States, not by any direct or express provisions of the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the National government is legitimately exercised within the States. While it is true *that* government cannot exercise its power of taxation so as to destroy the State governments, or embarrass their lawful action, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National government." Railroad *v.* Peniston, 18 Wall. 5, 30.

[8] M'Culloch *v.* Maryland, *supra;* Dobbins *v.* Commissioners, 16 Pet. 435; Collector *v.* Day, *supra;* United States *v.* Co., 17 Wall. 322; United States *v.* Reese, 92 U. S. 214; Van Brocklin *v.* Tennessee, 117 U. S. 151.

[9] United States *v.* R. Co., *supra.*

ances that seemed, to many, to be placed in jeopardy by the ratification of the Sixteenth Amendment. The Amendment gave Congress "power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." This seemed to undermine the structure of our government, remove the restrictions on Federal taxation, leaving the State agencies and functionaries at the mercy of the Federal taxing power. In fine, the question was presented: Does the Amendment bestow upon Congress a taxing power unlimited, bringing within this power subjects heretofore exempted? And these fears arose despite the history of taxation that led up to the ratification of the Amendment, the decision that was the immediate reason for the proposal thereof, and the purpose it was to serve.

From the very beginning, great difficulty was always encountered in drawing a line of cleavage between direct and indirect taxes,—whether or not it was necessary to apportion taxes according to constitutional provision.[10] Mr. Justice Van Devanter, in *Evans* v. *Gore,* 40 Sup. Ct. 550, succinctly states the situation prior to the ratification of the Amendment:

> "By the Constitution all direct taxes were required to be apportioned among the several States according to their population, as ascertained by a census or enumeration (art. 1, sect. 2, cl. 3, and sect. 9, cl. 4), but no such requirement was imposed as to other taxes. And apart from capitation taxes, * * *, no rule was given for determining what taxes were direct and therefore to be apportioned, or what were indirect and not within that requirement. Controversy ensued and ultimately centered around the right classification of income from taxable real estate and from investments in taxable personal property. The matter then came before this court in *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; id., 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108, and the decision when announced disclosed the same differences in opinion existing elsewhere were shared by the members of the court, five, the controlling number, regarding a tax on such income as in effect a direct tax on the property from which it arose, and therefore as requiring apportionment, and four regarding it as indirect and not to be apportioned. Much of the law then under consideration had been framed according to the latter view, and because of this and the adjudged inseparability of other portions the entire law was held invalid."

It was this lack of a definite line of demarcation and the ab-

[10] "At the beginning, however, there arose differences of opinion concerning the criteria to be applied in determining in which of the two great sub-divisions a tax would fall." Brushaber *v.* Union, etc., R. Co., 240 U. S. 1.

sence of a criterion [11] by which to judge, culminating as it did in the Pollock Case, that led to the adoption of the Sixteenth Amendment,—doing away with the necessity of apportioning taxes levied on incomes, from whatever source derived.

Mr. Justice Van Devanter, in *Evans* v. *Gore, supra,* continues:

> "Afterwards, to enable Congress to reach all taxable income more conveniently and effectively than would be possible as to much of it if an apportionment among the States were essential, the Sixteenth Amendment was proposed and ratified. In other words, the purpose of the Amendment was to eliminate all occasion for such an apportionment because of the source from which the income came,—a change in no wise affecting the power to tax but only the mode of exercising it."

The very punctuation of the Amendment is evidence in itself of its true meaning. The phrase, "from whatever source derived", is enclosed by commas, making it a parenthetic phrase, an interpolation, a qualifying phrase showing that apportionment is no longer necessary when taxing incomes, regardless of the source of those incomes. If the object of the Amendment was to extend the taxing power of Congress, the comma before the phrase above quoted should have been eliminated. It would have read, "The Congress shall have power to lay and collect taxes on incomes from whatever source derived, etc." It is evident, then, that the phrase "from whatever source derived" is not the governing phrase, and the emphasis should not be placed there. The underlying thought is that concerning the *apportionment* of the taxes which gave rise to so much confusion and difference of opinion.[12]

Our checks and balances are kept intact. The restrictions placed upon Congress are not affected by the Amendment, for it was aimed solely at the doctrine enunciated in the Pollock Case.

In the words of Chief Justice White:[13]

> "Indeed in the light of the history which we have given and the decision in the Pollock Case and the ground upon which the ruling in that case was based, there is no escape from the

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[11] "Notwithstanding the efforts which have been made to discover some principle which would furnish a practical guide for determining in all cases the distinction between a direct and indirect tax, and taxation, properly so-called, and the regulation of commerce and business, no certain *criteria* exist." ANDREWS, AMERICAN LAW, § 277.

[12] "It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense—an authority already possessed and never questioned—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all incomes from a consideration of the source whence the income was derived." Brushaber *v.* Union, etc., R. Co., *supra.* See also Stanton *v.* Baltic Mining Co., 240 U. S. 103; Tyer Realty Co. *v.* Anderson, 240 U. S. 115; Peck & Co. *v.* Lowe, 247 U. S. 165.

[13] Brushaber *v.* Union, etc., R. Co., *supra.*

conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock case was decided, that is, of determining whether a tax on income was direct, not by a consideration of the burden, placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source the income was derived, shall not be subject to the regulation of apportionment."

M. A. S.

DAMAGES FOR THE LOSS OF THE USE OF PROPERTY.—In these days of numerous automibiles used solely for pleasure purposes, it is interesting to note what damages can be recovered when a machine is injured by the negligent acts of a tort-feasor. In a recent decision in New York, the trend of modern authority is very well set forth. This case, *Dettmar* v. *Burns Bros.*, 181 N. Y. Supp. 146, holds, (1) that damages for the loss of the use of an automobile may be allowed against one who negligently injures it, although the owner intended to use it only for pleasure and not for rent or profit, and (2) that evidence of the rental value of an automobile is admissible upon the question of compensation to be awarded the owner for being deprived of its use through another's negligence, although he did not intend to rent it for profit.

It will now be of interest to follow, for a short space at least, the development of this branch of the law of damages as it has led up to the present view. A good starting-point is the rule that a recovery may generally be had for the loss of the use of specific property, where the reasonable worth of such use may be shown with fair certainty.[1] In another form it is stated that the damage in an action for injury to property not caused by malice is compensation commensurate with the loss, and this includes the expense of restoration of the property to soundness, compensation for the loss of its use during the period of disability, and the difference between its value before the injury and after the cure or repair.[2] This rule is subject to two conditions: the damages must be such as might naturally be expected to follow from the injury; and they must be certain, both in their nature and in respect to the cause from which they proceed.[3] The conclusion to be drawn from these premises is ably set forth in the case of *Griffin* v. *Colver*[4] by Selden, J.:

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[1] Hunt *v.* Oregon Pacific R. Co., 36 Fed. 481, 1 L. R. A. 842; Wright *v.* Mulvaney, 78 Wis. 89, 46 N. W. 1045, 9 L. R. A. 807.
[2] Schalscha *v.* Third Ave. R. Co., 43 N. Y. Supp. 251.
[3] Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718 and note.
[4] *Supra.*